Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

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ANITA L. BOWDEN

*Petitioner,*

v.

PUBLIC BUILDING COMMISSION OF CHICAGO

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE ILLINOIS APPELLATE COURT,
FIRST DISTRICT

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## PETITION FOR WRITE OF CERTIORARI

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55 pp

## QUESTIONS PRESENTED FOR REVIEW

Whether the Illinois Appellate Court, which affirmed the trial court's decision, violated principles of causation established in Whitaker v. Coleman, (CCA5th, 1940) 115 F2d 305 and Richard v. Credit Suisse, 242 N.Y. 346, 152 N.E. 110,111 (1926) in summary judgment motions, statutes of limitations, and "discovery rule" by concluding that Plaintiff/Anita Bowden filed her lawsuit more than two years after the accrual of her cause of action, granting motion of summary judgment to defendant/Public Building Commission of Chicago (PBCC) and dismissing Plaintiff's personal injury case due to chemical exposure.

Whether the Appellate Court violated Plaintiff's constitutional rights.

Whether the Appellate Court discriminated against Plaintiff who is an African-American female with a mental handicap who received inefficient assistance of counsel.

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STATUTES

28 U.S.C.A. - Rule 56
42 U.S.C.A. - 9658 (b) (4) (B) (ii)
First, Fifth, Seventh, Fourteenth Amendments to Constitution of United States
Section 13 of Bill of Rights of Illinois Constitution

## ORDERS BELOW

The order of the Illinois Supreme Court (App. 4); Illinois Appellate Court (App. 16); and Circuit Court of Cook County, Illinois (App. 27).

## JURISDICTION

The order of the Illinois Appellate Court was entered on 9/29/95. The jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1254 (1).

## STATUTES INVOLVED

This case concerns the proper application of: (1) summary judgment, 28 USCA - Rule 56; (2) Actions under federal law for damages from exposure to hazardous substances; statutes of limitations for hazardous substances; federally required commencement date for an incompetent individual, 42 U.S.C.S. § 9658 (b) (4) (B) (ii); (3) Violation of Petitioner's rights under the First, Fifth, Seventh, and Fourteenth Amendments of the Constitution of the United States and Section 13 of the Bill of Rights of the Illinois Constitution.

Pertinent statutory provisions are reprinted in the Appendix of this petition (App. 28).

## STATEMENT OF THE CASE

Plaintiff/Petitioner retained an attorney in May 1992 to file a personal injury lawsuit due to her exposure to chemical fumes on 9/12/91. Her lawyer field the suit on 1/28/93.

Trial court granted defendant's motion for summary judgment. Her first attorney appealed but included some incorrect and incomplete information in the Plaintiff's response to defendant's motion for summary judgment and the appeal. The correct and complete information is in the records but the Appellate Court denied Appellant's motion to correct record on appeal.

Some of the correct information is that when Plaintiff worked in the Biochemistry Lab she did NOT think she was exposed to those specific chemicals which emanated from the Chemistry Lab - which are the chemicals that Dr. Greene and Dr. Vuckovich said caused Plaintiff's lung and brain injury/illness.

The Illinois Appellate Court entered its judgment on 9/29/95. A petition for rehearing was filed 1/5/96. It was denied on 1/23/96. An affidavit of intent to seek review in the Illinois Supreme Court was filed 2/9/96. A motion for an extension of time was filed on 2/21/96. A petition for leave to appeal was filed 3/26/96. It was denied on 6/5/96. A request for an extension of time to file a petition for writ of certiorari was filed on 8/13/96 in Supreme Court of U.S. On

8/19/96. Justice Stevens granted the extension of time to and including November 2, 1996.

I. The Appellate Court improperly determined that Plaintiff knew or reasonably should have known of her injury two or more years prior to her filing a lawsuit.

A. When Plaintiff knew or reasonably should have known of her injury is a genuine issue of material fact, which requires jury determination.

II. The Appellate Court failed to evoke the "discovery rule" in analyzing Plaintiff's cause. The "discovery rule" as first adopted in Rozny v. Marnul, (1969), 43 Ill. 54, 72-73, 250 N.E.2d 656, states that:

A. The commencement of the relevant statute of limitations is postponed until the injured Plaintiff knows or reasonably should know that she has been injured; and

B. that the injury was wrongfully caused.

III. The Appellate Court placed excessive emphasis on the "continuing tort" theory and, by doing so, failed to evoke the "discovery rule" whose application was proper in this instance.

This case involves a personal injury due to chemical exposure sustained by the Plaintiff, Anita Bowden, in a building where she worked, which was owned by the Defendant, Public Building Commission of Chicago (PBCC) which is not the City of Chicago.

Over the course of approximately fourteen (14) years, 1972-1986, and from 9/93 through mid December 1993, Plaintiff was exposed to various toxic substances, namely Methyl Isobutyl Ketone, Ammonium Pyrrolidine Dithiocarbamate, Trichloroacetic Acid, Sodium Hydroxide, and Mercury (hereinafter the "Chemicals"). Plaintiff's exposure occurred in the Hematology/Baby (LL-75) and Clinical Chemistry (LL-76) laboratories (hereinafter "Chemistry Labs") in the second basement of the Daley Center.

From 1986 to 9/93, with the exception of one day, 9/12/91, Plaintiff worked in the biochemistry laboratory which was also in the second basement of the Daley Center, rooms LL-163, 164, 166, 168, and 170. When the plaintiff worked in the biochemistry labs she did not think she was still exposed to those specific chemicals/fumes which emanated from the "Chemistry Labs."

Plaintiff's exposure culminated in a singular traumatic event, when on 9/12/91, Plaintiff was transferred from the biochemistry laboratory o the "Chemistry Lab" where she was overcome by the chemical fumes and was rushed by ambulance to the emergency room at Northwestern Memorial Hospital for immediate medical attention. It was later determined that Plaintiff's continuous exposure to the chemical fumes resulted in permanent lung and brain damage. (Defendant's-Appellee's Brief, page 125) & (R71).

Plaintiff was on sick leave from 9/12/91 to 10/23/91. She returned to work in the Biochemistry lab until that lab closed permanently in 9/93. She was transferred back to the Chemistry Lab where she stayed until mid December 1993. All City labs were permanently closed by the end of 1993.

After her 9/12/91 injury, Plaintiff inquired about the harmful chemical fumes which emanated from the Chemistry Lab, and the overall poor ventilation system therein. Plaintiff received a 10/14/91 letter from the Health Department Deputy Commissioner, Richard H. Sewell, which stated that funds had been recently allocated to correct the air quality problems in the Chemistry Lab. (Defendant's-Appellee's Brief pages, 271-272.)

During Plaintiff's tenure at the Chemistry Lab she became concerned about various ailments she was experiencing, including headaches, nausea, burning eyes, and respiratory problems. Accordingly, she visited a doctor in 1985. This visit, however, never linked her symptoms with her exposure to the chemicals. It was not until after her trauma in 1991, that a definitive link was found between her ailments and her chemical exposure. A letter from lung specialist, Dr. Andrew Green, confirms this. Dr. Greene's letter, dated 4/16/92, signifies the definitive point when Plaintiff learned of her injuries. It was not until 1994 that Dr. M. Vickovich, MD, a neurologist, informed Plaintiff of a brain dysfunction due to the same chemicals/fumes (R147 & R148). Plaintiff filed her complaint on 1/28/93.

## REASONS FOR GRANTING WRIT

I. THE APPELLATE COURT DECISION DIRECTLY CONFLICTS WITH RECENT DECISIONS OF THIS COURT AND OTHER CIRCUITS ON THE ELEMENT OF CAUSATION FOR SUMMARY JUDGMENT MOTIONS.

The Illinois courts did not appear to use the rules and guidelines in Plaintiff's case as Federal and other State courts used in granting or not granting summary judgment to Defendant. Plaintiff's case was ruled on differently than cases with similar circumstances. Examples follow.

Beryllium Co. v. Meckley , (1990) 284 F2d 797, involves an action against corporation were Plaintiff developed berylliosis alledgedly as a result of the corporation's careless and negligent expulsion of noxious gases from its plant over a long period of time. The cruicial issue is whether or not the two year statute of limitations bars an action for damages caused by a disease of slowly insidious development in the respiratory tract.

The United States District Court for the Northern District of Ohio, J. Conel, entered order denying corporation's motion for summary judgment.

Cameron v. Vancouver Plywood Corp., (CA9th, 1959) 266 F2d 535, 540. ("All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment...It is especially

necessary to be cautious in making such a determination where, as here, a jury trial has been demanded."

Quiming v. International Pacific Enterprises Ltd. D. Hawaii (1990) 773 F.Supp.230. When direct evidence produced by party moving for summary judgment conflicts with that produced by nonmoving party, judge must assume truth of evidence set for by nonmoving party with respect to that fact.

Urie v. Thompson (1949) 337 US 163, 93 Led 1282, 69 S Ct. The Supreme Court of the United States held that contraction of silica dust over a period of 30 years did not, pursuant to the three year limitation in the Federal Employer's Liability Act, 45 USCA §51 et seq, bar the injured person's suit for compensation where he might have had the disease without knowing it for more than three years before he sued for compenation. The time elapsing between his discovery of his condition and the filing of his suit was not regarded as being in excess of the three year limitation period.

Weinberger v. Hynson, Westcott & Dunning (1973) 412 US 609, 621-22, 93 S CT 2469, 37 Led2d 207. ("If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment....")

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party's right to judgment is clear and free from doubt.

Espinoza v. Elgin, Joliet & Eastern Railway Co. (1955), 165 Ill.2d, 107, 113, 649 N.E.2d 1323. Although summary judgment is encouraged to aid the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation. Id. at 113. The Court must construe all evidence strictly against the movant and liberally in favor of the moving party. Id. at 114. Therefore, where "reasonable persons" could draw divergent inferences from the undisputed material facts or where there is a dispute as to material fact, summary judgment should be denied. Id. at 114. Plaintiff has neurological and psychological problems and does not fulfill requirement of a "reasonable person."

At issue is the contention that the Appellate Court has failed to recognize that a material issue of act still exists as to when Plaintiff knew or reasonably should have known of her injuries, and reasonably should have know that her injuries were caused by the wrongful acts of Defendant, and therefore summary judgment was improper and the matter should be submitted to a jury for review and determination.

This Court in its Order states that the facts in this matter were not in question. See Court's Order at pg. 4. To support this conclusion the Court wrote: "The Plaintiff does not dispute that she knew the Defendant had wrongfully caused her injuries for more than two years prior filing her complaint." See Record at 4. This is wrong. The Court misconstrued the evidence before it. Plaintiff, in fact, does

dispute the contention that she was aware of any injury wrongfully caused to her by Defendant, prior to 4/16/92.

There is a crucial distinction which must be pointed out here, Plaintiff complained of various ***discomforts*** while working in the Chemistry Lab not verifiable ***injuries***. And every though Plaintiff had actually been wrongfully injured by Defendant during this period, because she was not aware of her injury, or could not be held to a standard in which she reasonably should have been, the statute cannot be said to have commenced to run. The "discovery rule" postpones the commencement of the relevant statute of limitations until the injured Plaintiff knows or reasonably should know that she has been injured and that her injury was wrongfully caused. Rozny v. Marnul, (1969), 43 Ill. 2d 54, 72-73, 250 N.E.2d 56. Also Plaintiff has neurological and psychological problems and does not fulfill the requirement for a "reasonable person."

It was not until 4/16/92 that Plaintiff first learned of her injury, and in fact is the only time she could be held to a standard in which she reasonably could have learned of the injury. It was the first time Plaintiff had confirmed proof that she was wrongfully injured by the Defendant. Pursuant to a medical consultation, Dr. Greene, in his 4/16/92 letter informed Plaintiff that she suffered from injuries due to exposure to the exact toxic chemical substances found in the Chemistry Labs, and now suffers permanent lung damage.

In the trial, Plaintiff's first attorney argued a "continuing tort" theory, while simultaneously evoking the "discovery rule." But while the Court rejected Plaintiff's "continuing tort" theory, the Court failed to rule on Plaintiff's application of the "discovery rule." The Court should now reconsider this prior ruling and turn its attention to the date of discovery of the injury. There exists a material issue of fact as to when Plaintiff knew or reasonably should have known of her injuries.

Ironically, the very case that the Court cited as "directly applicable" to support the court's prior ruling is equally applicable to support Plaintiff's claim that she did not gain reasonably knowledge of her injuries until much later, and that the discovery rule should be evoked. Nolan v. Johns-Manville Asbestos, (1981), 85 Ill2d 161, 171, 421 N.E.2d 864. Nolan concerned an asbestos exposure claim. Plaintiff had worked as an asbestos insulator from 1941 to 5/11/73, and he had filed his claim for injuries sustained therefrom on 5/9/75. The trial court entered summary judgment against him, and Plaintiff appealed. The issues addressed by the Court were:

(1) whether Plaintiff had properly pleaded and was entitled to an application of the "discovery rule" under the circumstances of the case, and

(2) if so, whether there were genuine issues of fact relating to the application of the rule. Id. 421 N.E.2d at 864.

The Plaintiff in his work was required to apply asbestos and fiberglass pipe coverings for the purpose of insulating hot and cold heating ducts. Nolan at 865. In 1957, after 16 years of work, Plaintiff began experiencing problems such as generalized weakness throughout his body, shortness of breath, and a little difficulty in climbing stairs and carrying heavy equipment and materials while working. After these developments, Plaintiff had his x-rays taken at a mobile tuberculosis unit. He was told at that point that there were some problems with his lungs and he should have it looked at. Plaintiff's family doctor advised him that there were lung problems but that his complaints were not strong enough to suggest a relationship with asbestos. He suggested the problem might be partially mental. Id.

In Nolan, Plaintiff continued to experience problems, but did not go back to the doctor until 1965 when his complaints became more pronounced. At that point, he was again told that he had problems with his lungs, but asbestosis was not mentioned. The Plaintiff, despite the fact that his doctor did not indicate any causal connection between his job and his problems, had a strong suspicion, as Appellant in this case had, that his physical condition and his exposure to asbestos and other fibrous products were related. Nolan at 865.

After his 1965 appointment with the doctor, Plaintiff sought no further medical attention until 1973 when the

symptoms became every more severe. It is important to note that after 1968 Plaintiff, was consistently inundated with information and articles concerning the relationship between asbestos and his pulmonary problems, yet even still the court refused to hold that he should have had reasonable knowledge of his injury at that time. Finally, in 1973, after a long period of testing and a lung biopsy, Plaintiff's suspicions were confirmed. On 6/23/73, Plaintiff wrote a letter to a union representative stating that he "had a lung biopsy that shows scar tissue and asbestos fibers... something that has been known for years but something that I had learned to live with till Friday May 11, the last day I worked..." Nolan v. Johns-Manville Asbestos, (1979) 74 Ill.App.3d 778, 784; aff'd. 1981, 85 Ill.2d 161, 421 N.E.2d 864.

The defendants in Nolan argued that Plaintiff's symptoms, as well as his awareness of the possible tie between his health problems and his work in 1957, which caused him to get chest x-rays, should have triggered the running of the two year statute of limitations. They also argued alternatively, that he should have known he had contracted asbestosis between 1965-1970, which would have caused the statute of limitations to expire some time between 1967 and 1970. All arguments by the defendants revolved around the theory that Plaintiff had learned of the connection between his work and his health problems long before the 1975 filing date. Nolan, 421 N.E.2d at 867.

Despite such testimony, the Appellate Court reversed the Summary Judgment determination, and the Illinois Supreme Court affirmed. Speaking on the issue of summary judgment, the Appellate Court stated:

> "Although recognized as a salutary procedure in the administration of justice it is a remedy which should be granted with caution so that the respondent's right to a trial, wherein the evidentiary portion of his case may be presented, is not usurped in the presence of material conflicting facts and inferences. The function of this procedure is to determine whether triable issues of fact exist in the record, not to try such issues. The right of the moving party to summary judgment must be clear, free from doubt and determinable solely as a question of law. If there is present any fact or facts on which reasonable persons may disagree, or inference which may be fairly drawn from those facts and may lead to different conclusions, the motion court must stay its hand and permit the resolution of those facts and inferences to be made at trial." Nolan, 74 Ill. App.3d at 794, aff'd 1981, 85 Ill.2d 161, 421 N.E.2d 864.

The Supreme Court agreed with the Appellate Court's assessment that a genuine issue of material fact existed as to when Plaintiff knew or reasonably should have know that his health problems were caused by the wrongful acts of another. Nolan, 85 Ill.2d 161, 421 N.E.2d 864, 869.

The current case before the court is analogous to the Nolan case. And although not an asbestos case, it's sequence of factual events are very similar, and the legal issues raised almost identical.

Plaintiff, Anita Bowden, worked in the Daley Center basement from 1972 to mid December 1993. The record shows that Plaintiff had misgivings and concerns about her work environment, just as the Plaintiff did in Nolan. And while working in the Chemistry Lab, where th exposure to the chemicals had occurred, she experienced symptoms of chemical exposure sickness, and exhibited suspicions which linked her ailments to the chemicals at her workplace, as did the Plaintiff in Nolan. And as in Nolan, at various times during her employment she visited doctors complaining of various discomforts which she thought might have been work related, but her suspicions were never confirmed, until much later.

Moreover, like the Plaintiff in Nolan, Ms. Bowden discussed her concerns and suspicions about her health and the environment in which she worked with certain personnel. In a letter dated 7/20/88, from the Plaintiff to the Commissioner of City Hall Personnel, Jesse Hoskins, the Plaintiff gives a veritable "laundry list" of ailments of which she believes she suffers, some of which she attributes to her exposure to chemicals in the Chemistry Lab. See Record pg. 95 & 111. The letter however, was, in reality, a chaotic ensemble of her fears, and a desperate attempt to convince City personnel to relocate her. It could also be seen as a frustrated attempt of a woman trying to gain the sympathy of her employer to transfer her to a new job and new job

site. In part, Plaintiff was fearful of easily contacting AIDS/HIV and other infections due to her low white blood cell count.

To interpret this letter as factual evidence of Plaintiff's knowledge of her injuries has no basis. None of the claims of injuries pertaining to chemical exposure contained in the letter are substantiated by medical evidence. Some of her claims could even be construed as rather outrageous.

The Appellee, however, contends that this letter is evidence of actual knowledge of her injuries and that they were wrongfully caused. As we have already shown, this conclusion is without merit. Please keep in mind that both prior to and after this letter was written the Plaintiff visited several physicians, none of whom attributed her ailments to chemical exposure. Only when Ms. Bowden was overwhelmed by chemical fumes on 9/12/91 and taken by ambulance to the emergency room at Northwestern Hospital, did the effects of Ms. Bowden's continuous exposure to the chemicals manifest themselves to detection. Following her trauma of 9/12/91, Plaintiff again underwent a series of tests. On 4/16/92, Ms. Bowden received a letter from Dr. Greene (addressed to her attending physician, Dr. Stevenson) which outlined her exposure to the specific chemicals found in the Chemistry Lab and her resulting injury, permanent lung damage.

For the foregoing reasons, it seems reasonable that there exists a genuine material issues of face as to when Plaintiff/Appellant, Anita Bowden, should have reasonably known of her injuries.

The facts in this case are disputed and summary judgment on the issues of when the action accrued is improper.

The trial court's decision and the Appellate Court's affirmation of such a decision accept as fact the argumentative ramblings of a woman who was admittedly ill with a disease that affected her lungs and, as she later discovered, her brain. Some of her statements directly contradict medical knowledge. Not saying anymore than this, one reasons that the trial and Appellate courts have given full weight to the Appellee's interpretation of the facts.

The Defendant's motion for summary judgment was confined to questions of liability to the Plaintiff and did not address questions allowing relief explanation, elaboration or defense by the Plaintiff.

In the interest of justice, review of this Court is essential to the resolution of this case, and so that guidance is provided to other petitioners likely to confront the same or similar issues.

II. THE PETITION PRESENTS IMPORTANT ISSUES REGARDING THE ELEMENT OF CAUSATION IN SUMMARY JUDGMENT MOTIONS IN A PLAINTIFF'S PERSONAL INJURY CASE DUE TO CHEMICAL EXPOSURE.

More people in the military have been exposed to chemical weapons while during the Gulf War in the Middle East. Some of these servicemen are just now associating their illness with chemical weapon exposure in Iraq and the Gulf War syndrome.

Summary judgment application should be more carefully weighed when used since more people today are exposed to various "new age" chemicals.

Going into the 21st century, the laws governing summary judgment, statutes of limitations, and discovery rule for chemical and germ exposure cases should be tempered.

Conclusions: For the foregoing reasons, the petition for a writ of certiorari should be granted.

November 1, 1996

Respectfully submitted,

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